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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 802

MAH TOI, PETITIONER

v.

HERBERT BROWNELL, JR., AS ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-vii; R. 135-139) is reported at 219 F. 2d 642.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1955 (R. 140). The petition for a writ of certiorari was filed on May 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

APPENDIX

QUESTIONS PRESENTED

1. Whether, in a proceeding under the Nationality Act of 1940, a California court order entered in a proceeding to establish record of birth was conclusive evidence of petitioner's birth in the United States.

2. Whether there was sufficient evidence to support the trial court's finding that petitioner was not born in the United States.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

Article IV, Section 1 of the Constitution of the United States provides in part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U. S. C. [1946 ed. Supp V] 1738 provided:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> * * * * *
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court

within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U.S.C. [1946 ed.] 903, provided in part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States * * *.

Deering's General Laws of California [1924], Part 2, Act 9008, provided in part:

> § 21. *Certified copies of records. Fee for searching files.* The state or local registrar shall forthwith upon request supply to any applicant a certified copy of the record of any birth or death or marriage registered under provisions of this act, for the making and certification of which he shall be entitled to a fee

of fifty cents, to be paid by the applicant. And any such copy of the record of a birth or death or marriage when properly certified by the state or local registrar to have been so registered within a period of one year from the date of the event, shall be prima facie evidence in all courts and places of the facts therein stated. * * *

(b) *Petition to court to establish record. Order of court. Form.* If, upon such search it shall develop that for any cause any birth or death, or marriage, occurring in this state was not registered in conformity with the provisions of law in effect at the time when such birth or death or marriage occurred by the filing of the certificate therefor with the local registrar within a period of one year from the date of the event, any person beneficially interested in establishing of record the fact of such birth or death or marriage may petition the superior court of the county in which such birth or death or marriage is alleged to have occurred for an order judicially establishing the fact of such birth or death or marriage. Such petition shall be verified and shall contain all the data necessary to enable the court, upon hearing the same, to determine the fact of such birth or death or marriage upon the proofs adduced in behalf of the petitioner at the hearing thereof. A copy of such petition shall be served upon the local registrar of vital statistics, and also upon the district attorney of the county in which such birth or death or mar-

riage is alleged to have occurred, and either of said officials shall have the right in his discretion to appear at such hearing and oppose the making of such order. * * *

If, upon such hearing, the proofs of the allegation of the petition are established, to the satisfaction of the court, the court may make an order determining that such birth, death or marriage did in fact occur in such county and at the time shown by the proofs adduced upon such hearing.

Such order must be made in the form and upon the blank prescribed and furnished by the state registrar and but one birth, death or marriage may be included therein. And said order shall become effective upon the filing of a certified copy thereof with the local registrar of vital statistics, and the delivery therewith for transmittal to the state registrar of a standard certificate containing such facts and signatures as are obtainable, and upon the filing of a certified copy of said order with the state registrar.

Rule 52(a), Federal Rules of Civil Procedure, provides in part:

> * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

STATEMENT

Pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. [1946 ed.] 903) petitioner, in

November, 1951, instituted an action in the United States District Court for the Northern District of California seeking a judgment declaring him to be a citizen of the United States (R. 3-6). In his complaint, he alleged that he was born in San Francisco in 1902; that a judgment establishing such fact was entered in the Superior Court of California in 1923; that he left the United States with a United States passport in 1947 and returned in 1949; and that he was thereupon excluded on the ground that he was an alien not in possession of an unexpired immigration visa (R. 3-4). The answer denied that plaintiff was born in the United States (R. 7). The government admitted the entry of the order in 1923 by the Superior Court of California, but denied that the order established the facts relating to petitioner's birth and affirmatively asserted that it was obtained by fraud (R. 7). The answer also asserted that petitioner's United States passport was obtained by fraud and that petitioner "is not now and never has been a citizen of the United States" (R. 8).

At the trial, petitioner, who had to be questioned through an interpreter (R. 18-22), introduced the 1923 order of the Superior Court of California. He testified that he had obtained it in 1923 and that it related to him. (R. 22-26, 28-29.)

On cross-examination, petitioner testified that he was the fourth of five children born to his parents in the United States; that his parents and the four other children went to China in 1906 on a ship called the "Korea", leaving him, a child of four years, in

San Francisco (R. 31-33); and that he could not remember the names of any of his brothers and sisters (R. 34). He could not name his mother other than that she was called Wong Shee [meaning a married woman of the Wong family] (R. 51). He did not know whether she had any relatives (R. 52). He testified that his mother and father were dead, but when asked how he knew that fact, he said that, since he could not find out anything about them, "to me they were just as well believed to be dead." (R. 33, 35.) He could not remember whether he had seen his parents depart when he was four years old (R. 36-37), but testified that his parents told him that, when he reached twenty-one, he could go to court and obtain a document (R. 38). Although the Immigration Service, since 1882, has kept a record of Orientals departing for the Orient, there is no record of the departure of the alleged parents on the "Korea" (R. 78-79).

Petitioner testified that, after his parents left, he was raised by an uncle (R. 27), but that he did not know where the uncle was since he had not seen him for the past twenty years (R. 31). He testified that he last saw his uncle a year or so after he obtained the 1923 California court certificate (R. 57). To an immigration inspector who questioned him on January 26, 1949, petitioner had stated that he had not seen his uncle since he was ten years old (R. 63, 67).

Petitioner did not know the residence of the witnesses who had been used when he obtained the 1923 California order; he testified that he had not seen

them for twenty years and believed them to be dead (R. 39-42). He testified that he never went to school in the United States although he knew there was a public school near where he said he lived (R. 41). He testified that he lived at 700 Jackson St. in San Francisco until he was from six to ten years old (R. 30, 36, 55) and then in Washington Street when he was 10, 14 and 20 years of age (R. 45, 56). Before the Immigration Service he had testified that he did not know where he was living during those years (R. 50-51). He testified that he was living at the Jackson Street address in 1906, at the time of the earthquake; that he remembered it, and that the house was not destroyed (R. 56-57). A witness for the government, who had lived in San Francisco all his life, testified that he visited Chinatown after the earthquake and that there were no buildings standing that could have been occupied (R. 80).

In its oral comments at the close of the trial, the district court indicated that it was not impressed by petitioner's credibility and that it thought "he fabricated" (R. 89). The formal findings were to the effect that petitioner was not born in the United States and was not a national of the United States (R. 12). Accordingly, judgment was entered for respondent (R. 10). On appeal, the judgment was affirmed (R. 140). The court of appeals held that the California order of 1923 was entitled to no greater evidentiary weight than a birth certificate for which it is a substitute; that a birth certificate is merely prima facie evidence which can be rebutted; and

that all the circumstances, including the inconsistencies in petitioner's testimony, justified the conclusion of the trial court that the presumption had been rebutted and that petitioner had failed to prove his United States citizenship (R. 135-139).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that under the full faith and credit clause of the Constitution (Art. IV, sec. 1). as extended by statute to the federal courts (28 U. S. C. [1946 ed., Supp. V] 1738), federal agencies and courts are conclusively bound by the 1923 order of the Superior Court of California; that this established his birth in the United States; and that it was beyond the authority of the trial court to go behind the decree of the California court. We believe the fallacy of this position was effectively exposed by the court below (R. 135-139).

Under the full faith and credit clause, the state court order could be entitled to no more credit than it would receive in the state where it was rendered. 28 U. S. C. 1738; see, also, *Halvey* v. *Halvey,* 330 U. S. 610; *Stoll* v. *Gottlieb,* 305 U. S. 165; *Morris* v. *Jones,* 329 U. S. 545. Although there appear to be no California decisions on the precise effect of such an order, the controlling statutory provisions (*supra,* pp. 3-5) plainly indicate that such an order is in the nature of a delayed birth certificate and can constitute no more than prima facie evidence of the events recited therein.

The preamble to Act 9008, under which the order

was obtained, states that the purpose of the statute is to "provide a central bureau for the preservation of records of marriages, births and deaths, and to provide for the registration of all births and deaths, * * * [and] the issuance * * * [of] certificates of births and deaths * * *." Section 13 imposes a duty upon attending physicians and others to register all births with local officials. Section 21 (*supra,* p. 4) provides that the established records "shall be prima facie evidence * * * of the facts therein stated." See *Woodson Estate,* 36 Cal. App. 2d 77, 96 P. 2d 1016; also, *Lee Leong* v. *United States,* 217 Fed. 48 (C. A. 9). Section 21 (b) (*supra,* pp. 4-5) comes into play if a search reveals a failure in the records. In that event, a person beneficially interested in remedying the defect may file a petition in court. State officials may appear in their "discretion", but the proceeding need not be adversary. If the court is satisfied in the premises, it is to make an order "in the form and upon the blank prescribed and furnished by the state registrar * * *." Since the procedure is one for securing a substitute or delayed recording, there is no reason to suppose that the record thus obtained is to receive any greater weight than a record made contemporaneously with the event in question. When the district court held (R. 125) that the Superior Court order was "admissible in evidence and it raises a presumption," it gave it the maximum weight to which it was entitled.[1]

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[1] In *Ex parte Lee Fong Fook,* 74 F. Supp. 68 (N.D. Cal.), affirmed on other grounds, 170 F. 2d 245 (C.A. 9), certiorari

In sum, this case presents no issue of full faith and credit. It turns on the holding of the courts below that, *as a matter of California law*, the Superior Court's order, entered in a proceeding to establish record of birth, was not a conclusive determination. Certainly, in the absence of a contrary decision by the California courts, there is no occasion for this Court to consider a question of local law as to which the federal courts sitting in California are in agreement.

2. Similarly, there is no occasion for the Court to review the evidence underlying the concurrent findings of the courts below. The circumstances which showed petitioner's claim unworthy of belief are summarized in the court of appeals' opinion (R. 139) and in the Statement, *supra*, pp. 6-8. In the light of these circumstances and the trial judge's observation that petitioner was not a credible witness, it is plain that the findings cannot be regarded as "clearly erroneous." Rule 52(a).

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denied, 336 U.S. 914, another district judge rejected the contention that a state court order of the type here involved is conclusive in an immigration proceeding. Cf. *Lum Kim* v. *United States*, 225 Fed. 31 (C.A. 6), and *Ex parte Wilson Seen Lee*, 49 F. 2d 468 (W.D. Wash.), to the effect that a delayed birth certificate has no probative value.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1955.

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